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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

8
9 Salt River Project Agricultural
10 Improvement and Power District, a
11 municipal corporation and political
subdivision of the State of Arizona,
Headwaters Resources, Inc., a Utah
corporation,

12 Plaintiffs,

13 v.

14 Reynold R. Lee, Casey Watchman, Woody
15 Lee, Peterson Yazzie, Evelyn Meadows,
16 Honorable Herb Yazzie, Honorable Louise
G. Grant, Honorable Eleanor Shirley,
Leonard Thinn and Sarah Gonnig,

17 Defendants.
18

No. CV-08-08028-PCT-JAT

ORDER

19
20 Pending before the Court are three motions by the parties. First, Plaintiffs have
21 filed a Motion for Summary Judgment (Doc. 162) and a Statement of Facts in Support of
22 the Motion for Summary Judgment (Doc. 163). Defendants have filed a Response
23 ("Response") to this motion (Doc. 165) and a Response to the Statement of Facts in
24 Support of the Motion for Summary Judgment (Doc. 166). Plaintiffs in turn have filed
25 their Reply (Doc. 175).

26 Defendants have also filed a Cross Motion for Summary Judgment (Doc. 167) and
27 three supporting documents. These supporting documents include: Memorandum in
28 Support of Cross Motion for Summary Judgment (Doc. 165), Statement of Facts in

1 Support of Cross Motion for Summary Judgment (Doc. 166), and Declaration in Support
2 of the Cross Motion for Summary Judgment (Doc. 168). Plaintiffs have filed a Response
3 to the Cross Motion for Summary Judgment (Doc. 175) and a Response to the Statement
4 of Facts in Support of Defendants' Cross Motion for Summary Judgment (Doc. 176).
5 Defendants subsequently filed their Reply (Doc. 181).

6 Finally, Defendants have filed a Motion to Dismiss Parties (Doc. 169). Plaintiffs
7 have filed a Response to this motion (Doc. 173), and Defendants have filed a Reply (Doc.
8 178). Plaintiffs have also filed a Notice of Supplemental Citation of Authority in support
9 of their Response. (Doc. 184).

10 **I. FACTUAL BACKGROUND**

11 In 1969, Plaintiff Salt River Project Agricultural Improvement and Power District
12 ("SRP") and other energy utilities entered into a lease with the Navajo Nation to
13 construct and operate an electrical power plant called the Navajo Generating Station
14 ("NGS"), located near Page, Arizona, on the Navajo Reservation. SRP contracts with
15 Plaintiff Headwaters Resources ("Headwaters") at NGS. The lease SRP signed with the
16 Navajo Nation (the "1969 Lease") allows SRP to operate NGS on Navajo Nation land.
17 The 1969 Lease was signed by SRP among other utilities and Raymond Nakai, Chairman
18 of the Navajo Tribal Council. (Doc. 5-3 Ex. 1 at 36). At the same time SRP entered into
19 the 1969 Lease, the United States Secretary of the Interior granted SRP and the other
20 utilities certain easements and rights-of-way (the "§ 323 Grant"). The Secretary entered
21 into the § 323 Grant to induce SRP and the others to proceed with the development of
22 NGS.

23 The 1969 Lease contains two clauses pertinent to this action. In section 16, "[t]he
24 Tribe covenants that, other than as expressly set out in this Lease, it will not directly or
25 indirectly regulate or attempt to regulate the Lessees in the construction, maintenance or
26 operation of [NGS]" ("non-regulation clause"). (Doc. 5-3 Ex. 1 at 9). In section 18, SRP
27 agreed to give preference in employment to local Navajos ("employment preference
28 clause"). (*Id.* at 10-11).

1 In October 1985, approximately sixteen years after the 1969 Lease was signed and
2 ten years after NGS became fully operational, the Navajo Nation enacted the Navajo
3 Preference in Employment Act (“NPEA”). The impetus for the NPEA was the Navajo
4 Tribal Council’s dissatisfaction with the lack of progress made over the years in
5 employing and training Navajo people by companies doing business within the Navajo
6 Nation. (Doc. 168-1 Ex. 1 at 4). The NPEA was passed to affect major private
7 companies, which had originally committed themselves by lease provisions to give
8 Navajo preference in employment. (*Id.*) SRP was one of these companies. (*Id.* at 13).
9 The Navajo Tribal Council found that preference obligations—such as the one in the
10 1969 Lease—and existing Navajo law on preference were too vague, rendering them
11 effectively unenforceable. (*Id.* at 5). The NPEA was unilaterally created to resolve
12 compliance problems with these preference obligations, and establishes various rights for
13 Navajo employees and obligations for private non-Navajo employers. (*Id.* at 6).

14 The NPEA is enforced throughout the Navajo reservation by the Office of Navajo
15 Labor Relations (“ONLR”) and the Navajo Nation Labor Commission (“NNLC”). The
16 ONLR was created by the Navajo Tribal council and has the responsibility to examine
17 claims made under the NPEA and, if warranted, file complaints against offenders of the
18 NPEA on behalf of individual Navajos. (*Id.* at 9). The NNLC conducts the hearings on
19 NPEA complaints filed by the ONLR and issues written decisions following those
20 proceedings. (*Id.* at 7).

21 **II. PROCEDURAL BACKGROUND**

22 These motions come before the Court following a long litigation process. This
23 case originated with two separate employee complaints filed by Leonard Thinn and Sarah
24 Gonnie, both members of the Navajo Nation, who worked at NGS.

25 On December 2, 2004, Mr. Thinn, a former employee of SRP, filed a charge with
26 the ONLR, alleging that he had been terminated by SRP without just cause in violation of
27 the NPEA. The ONLR determined there was probable cause to believe SRP had violated
28 the NPEA and issued a Notice of Right to Sue. Mr. Thinn then filed a complaint against

1 SRP with the NNLC on November 15, 2005. SRP filed a motion to dismiss the
2 complaint for lack of jurisdiction which the NNLC granted. Mr. Thinn filed a notice of
3 appeal on May 12, 2006.

4 On March 2, 2005, Ms. Gonnie, a former employee of Headwaters, filed a charge
5 with the ONLR alleging that she had been terminated by Headwaters for unreasonable
6 and insufficient reasons. On September 16, 2005, the ONLR issued Ms. Gonnie a Right
7 to Sue letter. On September 22, 2005, Ms. Gonnie filed a complaint with the NNLC
8 against Headwaters. On April 28, 2006, the NNLC granted Headwaters's motion to
9 dismiss for lack of jurisdiction. Ms. Gonnie appealed on May 12, 2006.

10 The Navajo Nation Supreme Court consolidated the Thinn and Gonnie appeals
11 and reversed the judgments of the NNLC. The Navajo Nation Supreme Court ruled that
12 the NPEA applies to SRP and Headwaters and that the NNLC has jurisdiction to enforce
13 the NPEA against them. The Navajo Nation Supreme Court remanded to the NNLC for
14 further proceedings on the merits of the Thinn and Gonnie claims.

15 The NNLC set the two cases for hearings in April 2008. SRP and Headwaters
16 filed motions with the NNLC to stay the Thinn and Gonnie hearings based on SRP's
17 request to have the Secretary of the Interior (the "Secretary") address the jurisdictional
18 issue. On February 27, 2008, the NNLC denied the motions to stay.

19 On February 29, 2008, Plaintiffs filed their Complaint in this Court (Doc. 1)
20 against Defendants. Defendants are Navajo tribal officials in their official capacity as
21 representatives of the Navajo Nation. Subsequently, the NNLC stayed the Thinn and
22 Gonnie cases.

23 Plaintiffs' Complaint sought a declaratory judgment that the Navajo Nation could
24 not lawfully apply the NPEA against the Plaintiffs or regulate the employment policies of
25 Plaintiffs in any way except as provided in the 1969 Lease. (Doc. 1 at 12). Plaintiffs
26 further sought a preliminary injunction to prevent the Navajo Nation, through tribal
27 officials, from regulating employment at NGS. (Doc. 5).

28 The Navajo Defendants filed a Motion to Dismiss the Complaint (Doc. 34) with

1 the Court in March 2008. In section 25 of the 1969 Lease there is an arbitration clause
2 that requires all disagreements or disputes between the parties to be submitted to the
3 Secretary of the Interior for decision. (Doc. 5-3 Ex. 1 at 15-23). In their motion to
4 dismiss, Defendants argued that Plaintiffs must submit the jurisdictional dispute to the
5 Secretary pursuant to section 25 and could not file the case with the District Court as a
6 first resort.

7 In addition to filing this case on February 29, on February 4, 2008, Plaintiffs
8 pursued dispute resolution before the Secretary. Plaintiffs sent a letter to the Secretary
9 requesting that he rule that the NPEA does not apply to SRP or Headwaters at NGS.
10 (Doc. 5-9 Ex. 12).

11 The Secretary initially responded in a letter dated May 10, 2008, by finding that
12 the Navajo Nation had not clearly waived the Nation's right to regulate employment
13 relationships at NGS in the 1969 Lease. (Doc. 55-2 Ex. 1 to Ex. A). Following that
14 response, SRP sent correspondence dated June 24, 2008 to the Secretary requesting
15 reconsideration of his decision. (Doc. 55-2 Ex. 2 to Ex. A). In a letter dated August 1,
16 2008, a different Acting Deputy Assistant Secretary indicated that the Secretary would
17 entertain the request for reconsideration. (Doc. 55-2 Ex. 3 to Ex. A). Then, in a letter
18 dated October 2, 2008, the Secretary declined to decide the jurisdictional dispute and
19 instead deferred to the Court's determination of this litigation. (Doc. 74-2 Ex. 1-Ex. B).

20 In January 2009, the Court granted Defendants' Motion to Dismiss. (Doc. 89).
21 The Court found that rather than the Secretary deferring to the Court's determination of
22 the applicability of the NPEA at the NGS, the Secretary should be the party to decide the
23 issue per the terms of section 25 of the 1969 Lease. (*Id.*) In February 2009, Plaintiffs
24 appealed the Court's order granting the Motion to Dismiss to the Ninth Circuit Court of
25 Appeals. (Doc. 95). In March 2010, the Court of Appeals reversed this Court's decision
26 in an unpublished opinion and remanded the case to this Court for further proceedings
27 holding that Plaintiffs' claims were properly before the Court. (Doc. 109-1 at 3); *Salt*
28 *River Project Agr. Imp. & Power District v. Lee*, 2010 WL 1041492, 371 Fed. Appx. 779

1 (9th Cir. 2010) (SRP I).

2 With the case back before the Court, in July 2010, Defendants filed another
3 Motion to Dismiss pursuant to Federal Rule of Civil Procedure 19. (Doc. 125). In
4 December 2010, the Court granted Defendants' second motion to dismiss on the grounds
5 that this action was based in large part on interpreting the 1969 Lease to which the
6 Navajo Nation was a signatory and therefore the Navajo Nation should be joined as a
7 party. (Doc. 150 at 9). Joinder, however, was not feasible because the Navajo Nation
8 had sovereign immunity. (*Id.*) Plaintiffs then appealed this Court's order to the Court of
9 Appeals.

10 In March 2012, the Court of Appeals reversed the Court's order dismissing the
11 case and remanded to the Court for further proceedings in *Salt River Project Agr. Imp. &*
12 *Power v. Lee*, 672 F.3d 1176 (9th Cir. 2012) (SRP II). Following this ruling by the Court
13 of Appeals, the parties filed the motions at issue in July and August 2012.

14 **III. DEFENDANTS' MOTION TO DISMISS PARTIES**

15 Defendants Yazzie, Grant, and Shirley (the "Justices"), who are each current or
16 former Justices of the Navajo Nation Supreme Court, have moved to be dismissed from
17 this action because they are protected by immunity. (Doc. 169 at 2). The Justices argue
18 that they are protected by sovereign immunity because the doctrine established by the
19 United States Supreme Court in *Ex parte Young*, 209 U.S. 123 (1908), does not apply to
20 them. (*Id.*) Further, the Justices contend that absolute judicial immunity applies and
21 protects them from claims for injunctive relief. (*Id.* at 8).

22 **A. *Ex Parte Young***

23 The Justices propose a two part argument for why the *Ex parte Young* doctrine
24 does not apply and they are immune here. First, the Justices argue they must have acted
25 in contravention of federal law for *Ex parte Young* to apply, and by acting within the
26 scope of their judicial authority to determine tribal jurisdiction they did not violate
27 federal law. (Doc. 169 at 4). Second, the Justices argue that for *Ex parte Young* to apply,
28 officials must have a tangible connection to the enforcement of the law at issue, and the

1 Justices have no material connection to the enforcement of the NPEA against Plaintiffs.
 2 (*Id.* at 6).

3 **1. Violation of Federal Law**

4 Generally, under the Eleventh Amendment the States enjoy sovereign immunity.
 5 This immunity extends to State officials when acting in their official capacity. However,
 6 the *Ex parte Young* doctrine is a narrow exception to this general rule which allows
 7 government officials to be sued in their official capacity for violating federal law, without
 8 the presence of the immune State. *SRP II*, 672 F.3d at 1181. “The *Ex parte Young*
 9 doctrine applies to Indian tribes as well.” *Vann v. United States Dep’t of the Interior*, No.
 10 11-5322, 2012 WL 6216614, at *3 (D.C. Cir. Dec. 14, 2012) (citing *Okla. Tax Comm’n v.*
 11 *Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 514 (1991)). Under *Ex*
 12 *parte Young*, “tribal sovereign immunity does not bar a suit for prospective relief against
 13 tribal officers allegedly acting in violation of federal law.” *Burlington N. & Santa Fe*
 14 *R.R. Co. v. Vaughn*, 509 F.3d 1085, 1092 (9th Cir. 2007) (citations omitted).

15 The Justices acknowledge *Ex parte Young* as explained by the Ninth Circuit Court
 16 of Appeals in *Burlington*, but then the Justices cite *Hardin v. White Mountain Apache*
 17 *Tribe*, 779 F.3d 476, 479 (9th Cir. 1985), for the proposition that, “tribal immunity
 18 extends to individual tribal officials acting in their representative capacity and within the
 19 scope of their authority.” (Doc. 169 at 4). The Justices’ central argument on this point is
 20 that in holding that the NPEA could be enforced at NGS they were acting within the
 21 scope of their authority and were not subject to suit under *Ex parte Young*. (Doc. 169 at
 22 6). What the Justices have done, however, is reverse the order of the quotes from
 23 *Burlington* and *Hardin* to misstate the rule. The Justices make this misstatement again in
 24 their Reply when they claim “[w]here ‘officials are acting in their respective capacity and
 25 within the scope of their authority,’ tribal immunity applies and prevents suits brought,
 26 even under *Ex parte Young*.” (Doc. 178 at 4 citing *Hardin*, 779 F.2d at 479) (emphasis
 27 added).

28 To properly explain the rule for sovereign immunity of tribal officers, the quote

1 explaining *Ex parte Young* should be placed after the general rule as quoted in *Hardin*, as
 2 it was by the Court of Appeals in *Burlington*. In *Burlington*, the Court of Appeals
 3 explained,

4 sovereign immunity bars suit against an Indian tribe in federal
 5 court. *Kiowa Tribe of Okla.*, 523 U.S. at 754. This immunity
 6 protects tribal officials acting within the scope of their valid
 7 authority. *Hardin v. White Mountain Apache Tribe*, 779 F.2d
 476, 479–80 (9th Cir. 1985).

8 Under the doctrine of *Ex Parte Young*, immunity does not
 9 extend to officials acting pursuant to an allegedly
 10 unconstitutional statute. 209 U.S. 123, 155–56 (1908)
 11 (holding that Eleventh Amendment immunity was not a bar to
 12 suit against the state’s Attorney General to enjoin him from
 13 enforcing a law that the plaintiffs alleged violated the Due
 14 Process Clause of the Fourteenth Amendment). This doctrine
 15 has been extended to tribal officials sued in their official
 16 capacity such that “tribal sovereign immunity does not bar a
 suit for prospective relief against tribal officers allegedly
 acting in violation of federal law.” *Burlington N. R.R. Co. v.*
Blackfeet Tribe, 924 F.2d 899, 901 (9th Cir. 1991), *overruled*
on other grounds by Big Horn County Elec. Coop., Inc. v.
Adams, 219 F.3d 944, 953 (9th Cir. 2000).

17 *Burlington*, 509 F.3d at 1091-92.

18 In *Hardin*, the Court of Appeals upheld a finding of sovereign immunity in favor
 19 of tribal police officers who had forcibly removed a non-Indian member from his home
 20 on the reservation after the tribal council had decided to exclude him permanently from
 21 the reservation. The tribal officers were carrying out a direct order from the tribal
 22 council. *Hardin*, 779 F.2d at 479-480. The *Ex parte Young* doctrine, however, was not
 23 addressed by the Court of Appeals in *Hardin*. *Ex parte Young* is the exception to the
 24 general rule of tribal immunity as stated in *Hardin*—*Hardin* is not the exception to *Ex*
 25 *parte Young*. See *Burlington*, 509 F.3d at 1092 (citing *Nat’l Audubon Soc’y, Inc. v.*
 26 *Davis*, 307 F.3d 835, 847 (9th Cir. 2002) (referring to the doctrine as “the *Ex parte Young*
 27 exception”)).

28 To apply sovereign immunity in the way the Justices have argued, it would

1 effectively make *Ex parte Young* inapplicable in any case. *Ex parte Young*, however, is
 2 still controlling law. Further, the Ninth Circuit Court of Appeals explicitly stated when
 3 this case was on appeal, that “[t]his lawsuit for prospective injunctive relief may proceed
 4 against the officials under a routine application of *Ex parte Young*.” *SRP II*, 672 F.3d at
 5 1181.

6 “In determining whether *Ex Parte Young* is applicable to overcome the tribal
 7 officials’ claim of immunity, the relevant inquiry is only whether [plaintiff] has alleged
 8 an ongoing violation of federal law and seeks prospective relief.” *Burlington*, 509 F.3d at
 9 1092 (citing *Verizon Md., Inc. v. Pub. Serv. Comm’n of Md.*, 535 U.S. 635, 645–46
 10 (2002)). Thus, the question before the Court is whether Plaintiffs have alleged an
 11 ongoing violation of federal law.

12 Looking at the Complaint, Plaintiffs allege that,

13 Defendants [including the Justices] have proceeded . . .
 14 against SRP . . . in the operation of NGS beyond Defendants’
 15 jurisdiction, without basis in law, and in violation of federal
 16 law, as the [Navajo Nation Supreme Court] has no authority
 17 to order the NNLC to proceed in the Thinn and Gonnies
 18 matters . . . and all such actions have no basis in law, and
 violate federal law, the determination that the Navajo Nation
 still had that authority is what violated federal law.

19 (See Doc. 1 at 13 ¶ 56). The Justices have told the NNLC that the NPEA applies at NGS,
 20 and told the NNLC to proceed against Plaintiffs on the Thinn and Gonnies claims under
 21 the NPEA. This is a looming order by the Justices, still in effect, which the NNLC is
 22 bound to follow.

23 This was the same violation of federal law made by the Navajo Nation Supreme
 24 Court in *Arizona Public Service Co. v. Aspaas*, 77 F.3d 1128 (9th Cir. 1996). In *Aspaas*,
 25 the Navajo Nation Supreme Court had also ruled that the NPEA was enforceable against
 26 the nonmember plaintiff. *Id.* at 1131. The plaintiff sued Justices of the Navajo Nation
 27 Supreme Court among various other Navajo officials for the same reason in this case—
 28 that enforcement of the NPEA against the plaintiff was a violation of federal law. *Id.*

1 The Ninth Circuit Court of Appeals rejected the official Navajo defendants', including
2 the Justices', argument that they were protected by sovereign immunity and allowed
3 plaintiff's claims to be successfully asserted against them. *Id.* at 1133-34.

4 Given Plaintiffs' Complaint, the Court finds the allegations are sufficient under *Ex*
5 *parte Young* to claim an ongoing violation of federal law by the Justices.

6 **2. Enforcement**

7 The Justices second argument for why *Ex parte Young* does not apply is that they
8 are not involved in any enforcement action, are not charged with the enforcement, and do
9 not have a tangible connection to the enforcement of the alleged violation. (Doc. 169 at
10 6).

11 “[N]amed officials must have the requisite enforcement connection to the
12 challenged law for the *Ex Parte Young* exception to apply.” *Burlington*, 509 F.3d at 1092
13 (citations and quotations omitted). According to the Justices, the requisite connection
14 “mean[s] that the official must have some meaningful participation in the actual
15 enforcement of the law.” (Doc. 169 at 6). The question for the Court is what satisfies the
16 requisite enforcement connection.

17 In *Burlington*, the nonmember plaintiff sued two tribal officials in their official
18 capacity for taxing the plaintiff in violation of federal law. 509 F.3d at 1089. One
19 official was the official allegedly responsible for administering and collecting the
20 challenged tax. The other official was the Tribal Chairman and was responsible for
21 exercising executive authority over the Tribe. Plaintiff had made no allegations that the
22 Tribal Chairman was in any way responsible for enforcing the tax. The Court of Appeals
23 found that the plaintiff's failure to allege that the Tribal Chairman was “in any way
24 responsible for enforcing” the tax, prevented the *Ex parte Young* exception from applying
25 to the Chairman. *Id.* at 1093. However, the Court of Appeals did find that plaintiff's
26 allegations against the other tribal official were enough of a connection for *Ex parte*
27 *Young* to apply. *Id.*

28 The Court of Appeals exclusively cited their previous opinion in *National*

1 *Audubon Society, Inc. v. Davis*, 307 F.3d 835 (9th Cir. 2002), for their reasoning in
2 *Burlington*. 509 F.3d at 1089. In *National Audubon Society*, plaintiffs sued the Governor
3 of California, the state Secretary of Resources and the Director of the California
4 Department of Fish & Game among other defendants for their role in enforcing an
5 allegedly unconstitutional voter approved law restricting the use of certain kinds of
6 animal traps. The Court of Appeals found that *Ex parte Young* did not apply to the
7 Governor and Secretary of Resources because plaintiffs failed to make any showing that
8 these parties had the requisite enforcement connection. *Nat'l Audubon Soc'y*, 307 F.3d at
9 847. However, the Court of Appeals found that the Director of the Department of Fish &
10 Game did have the requisite connection for *Ex parte Young* to apply because he had
11 direct authority over and principal responsibility for enforcing the law. *Id.*

12 Unlike the Tribal Chairman in *Burlington*, who merely had executive authority
13 and had not allegedly made any decisions or taken any action with respect to the taxes at
14 issue in that case, and the Governor and Secretary of Resources in *National Audubon*
15 *Society*, who also merely possessed executive authority over the State, the Justices here
16 are not just executives, they have taken action and made decisions directly related to the
17 alleged ongoing violation of federal law.

18 As Plaintiffs contend, the Justices are a critical part of the Tribe's enforcement of
19 the NPEA. (Doc. 173 at 9). Under the NPEA, once the ONLR and the NNLC have
20 issued their decisions with respect to whether the NPEA applies to nonmembers, the
21 Justices are the final tribal decision maker for parties to seek relief from. 15 Navajo
22 Nation Code § 613(A). In this case, the Justices played a direct role in attempting to
23 enforce the NPEA against Plaintiffs. When the original claims by Thinn and Gonnine
24 were initially brought to the NNLC, the NNLC found that the tribe did not have
25 jurisdiction to apply the NPEA, but the Justices reversed the NNLC finding. The tribe
26 would not be, and could not be, attempting to enforce the NPEA against Plaintiffs absent
27 the actions of the Justices. Consequently, the Court finds that Plaintiffs have alleged
28 enough of an enforcement connection to the challenged law.

1 Therefore, because Plaintiffs have alleged an ongoing violation of federal law and
 2 alleged enough of an enforcement connection to that law, *Ex parte Young* applies and
 3 sovereign immunity does not to apply to the Justices.

4 **B. Judicial Immunity**

5 Finally, the Justices argue that they should be dismissed because they enjoy
 6 judicial immunity from claims for injunctive relief. (Doc. 169 at 8).

7 The Justices are being sued in their official capacity. A judicial immunity defense
 8 does not apply to official capacity claims. In *Kentucky v. Graham*, the United States
 9 Supreme Court explained,

10 When it comes to defenses to liability, an official in a
 11 personal-capacity action may, depending on his position, be
 12 able to assert personal immunity defenses, such as objectively
 13 reasonable reliance on existing law. In an official-capacity
 14 action, these defenses are unavailable. The only immunities
 15 that can be claimed in an official-capacity action are forms of
 sovereign immunity that the entity, *qua* entity, may possess,
 such as the Eleventh Amendment.

16 473 U.S. 159, 166-67 (1985); *see also Pulliam v. Allen*, 466 U.S. 522, 541-542 (1984)
 17 (“We conclude that judicial immunity is not a bar to prospective injunctive relief against
 18 a judicial officer acting in her judicial capacity.”).

19 In this case, the Court has already rejected the Justices sovereign immunity
 20 defense under the Eleventh Amendment. As explained, the *Ex parte Young* exception
 21 applies in this case. Further, judicial immunity does not apply here because the Justices
 22 were not sued in their individual capacity. Consequently, the Justices are not immune to
 23 Plaintiffs’ claims.

24 **IV. CROSS MOTIONS FOR SUMMARY JUDGMENT**

25 Both parties have moved for summary judgment. Plaintiffs allege that Navajo
 26 officials have violated federal law by acting beyond their scope of authority in trying to
 27 regulate employment at NGS through the NPEA, and further, any authority Defendants
 28 could have had to regulate employment was waived by the terms of the 1969 Lease.

1 (Doc. 162 at 9-14, 16-17). Defendants argue that employment regulation on tribal land is
2 an issue of tribal law and the power to regulate has not been waived. (Doc. 165 at 9).
3 Both parties seek a declaratory judgment by this Court. (Doc. 162 at 20); (Doc. 165 at
4 21). Plaintiffs further seek injunctive relief. (Doc. 162 at 20).

5 The parties' claims present two primary issues to the Court. The first issue is
6 sovereign authority, specifically, whether the Navajo Nation has the sovereign authority
7 to regulate the employment policies of a non-Indian employer. The second issue is
8 whether the Navajo Nation waived that sovereign authority by the terms of the 1969
9 Lease.

10 The sovereign authority issue centers on whether the United States Supreme
11 Court's decision in *Montana v. United States*, 450 U.S. 544 (1980), applies to the
12 circumstances here.

13 The waiver issue centers on the word "operation" as it is used in section 16 of the
14 1969 Lease, where "the Tribe covenants that, other than as expressly set out in this Lease,
15 it will not directly or indirectly regulate or attempt to regulate the Lessees in the
16 construction, maintenance or operation of [NGS]." (Doc. 5-3 Ex. 1 at 9). The question is
17 whether the term "operation" encompasses employment policies.

18 Before the Court can determine whether either party is entitled to judgment as a
19 matter of law on the two primary issues, the Court must address two threshold issues the
20 parties have also raised. First, Defendants argue this action should not be before the
21 Court because tribal jurisdiction is solely an issue of tribal law. Second, before the Court
22 can determine the limits of the Navajo Nation's jurisdiction, the Navajo Nation must have
23 been given the opportunity to determine its own jurisdiction.

24 **A. THRESHOLD ISSUES**

25 **1. Employment Regulation of a Non-Indian Employer is an Issue of**
26 **Federal Law**

27 As an initial matter, this case is properly before the Court because it implicates an
28 issue of federal law. Defendants argue that employment regulation on tribal land is

1 solely an issue of tribal law; to wit, the Navajo Nation has jurisdiction over employment
 2 issues at NGS because of the consensual relationship between Plaintiffs and Defendants.
 3 (Doc. 165 at 9). Further, Defendants contend because this is an issue of tribal law the
 4 Court should dismiss this action and uphold tribal jurisdiction. *Id.* The Court disagrees.

5 The issue before the Court is whether the Navajo Nation Supreme Court and
 6 NNLC have exceeded the limits of their jurisdiction by trying to apply the NPEA to SRP
 7 and Headwaters. In *National Farmers Union Ins. Cos. v. Crow Tribe*, the United States
 8 Supreme Court held that “the question of whether an Indian tribe retains the power to
 9 compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is
 10 one that must be answered by reference to federal law and is a federal question under [28
 11 U.S.C.] § 1331.” 471 U.S. 845, 852 (1985). In a nearly identical set of circumstances to
 12 the case at bar, the Ninth Circuit Court of Appeals explained in *Arizona Public Service*
 13 *Co. v. Aspaas*, that this rule from *National Farmers* applies to non-Indian lessees as well
 14 as non-Indian land owners on Indian land. 77 F.3d 1128, 1132 (9th Cir. 1996).
 15 Therefore, this action is properly before the Court because 28 U.S.C. § 1331 renders the
 16 question of whether “the Navajo Nation can apply tribal law to regulate the activities of a
 17 non-Indian” lessee an issue of federal law. *Id.*

18 **2. The Rule of Exhaustion has been Satisfied**

19 This case is also properly before the Court because the Navajo Nation Supreme
 20 Court and the Secretary of the Interior have made their decisions, and found that the
 21 Navajo Nation has the jurisdiction to regulate Plaintiffs.

22 *National Farmers* established a prudential rule of exhaustion that has been
 23 satisfied here. 471 U.S. at 857 (while “§ 1331 encompasses the federal question whether
 24 a tribal court has exceeded the lawful limits of its jurisdiction . . . exhaustion is required
 25 before such a claim may be entertained in federal court.”). Exhaustion means the tribal
 26 court has had a full opportunity to determine its own jurisdiction. *Iowa Mut. Ins. Co. v.*
 27 *LaPlante*, 480 U.S. 9, 16 (1987) (“[T]he federal policy supporting tribal self-government
 28 directs a federal court to stay its hand in order to give the tribal court a full opportunity to

determine its own jurisdiction.” (quotation marks and citation omitted)); *see also Burlington N. R.R. Co. v. Crow Tribal Council*, 940 F.2d 1239, 1246 (9th Cir. 1991), *overruled on other grounds by Big Horn County Elec. Coop., Inc. v. Adams*, 219 F.3d 944, 953 (9th Cir.2000) (“[T]he [] tribe must itself first interpret its own ordinance and define its own jurisdiction The practical imperative of judicial efficiency also compels exhaustion of tribal remedies.”). Thus, the Navajo Nation has made a final determination of its own jurisdiction—the Navajo Nation Supreme Court ruled that the NNLC has the jurisdiction to enforce the NPEA against Plaintiffs. Further, the Court of Appeals has also held that the Secretary of the Interior has exhausted his involvement in this claim. *SRP I*, 371 Fed. Appx. at 780. Accordingly, tribal courts and the Secretary have had a full opportunity to determine the Navajo Nation’s jurisdiction here, and the question of whether the Navajo Nation has then exceeded its jurisdiction is properly before the Court.

B. PRIMARY ISSUES

1. Sovereign Authority to Regulate Employment

Before the Court can determine if the Navajo Nation has waived its authority by the terms of the 1969 Lease, the Court must determine whether the Navajo Nation has the authority to regulate the employment policies of a non-Indian employer.

a. Whether *Montana* Applies is Irrelevant

Plaintiffs argue that whether the tribe has the authority to regulate employment is governed by the test set forth in *Montana v. United States* and its progeny. (Doc. 162 at 9-14). *Montana* stands for the general rule “that the inherent powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.” *Montana v. United States*, 450 U.S. 544, 565 (1980). This rule, however, came with two exceptions. The *Montana* Court stated:

[There are two circumstances in which] Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. [1] A tribe may regulate, through

1 taxation, licensing, or other means, the activities of
2 nonmembers who enter consensual relationships with the
3 tribe or its members, through commercial dealing, contracts,
4 leases, or other arrangements. [2] A tribe may also retain
5 inherent power to exercise civil authority over the conduct of
6 non-Indians on fee lands within its reservation when that
7 conduct threatens or has some direct effect on the political
8 integrity, the economic security, or the health or welfare of
9 the tribe.

10 *Montana*, 450 U.S. at 565-566 (internal citations omitted).

11 Plaintiffs argue that the general rule of *Montana* governs and that the relationship
12 between Plaintiffs and Defendants does not implicate either exception. (Doc. 162 at 11-
13 13). On the other hand, Defendants argue that *Montana* does not apply to this case and
14 the tribe has the sovereign authority to regulate employment policies at NGS. (Doc. 165
15 at 9-11). Further, Defendants contend that even if *Montana* did apply, an exception to
16 *Montana* would also apply and the tribe would still have the sovereign authority to
17 regulate employment. (*Id.* at 11-13).

18 Under the circumstances of this case, any determination of whether *Montana*
19 applies centers on the ownership of the land—whether the nonmembers of the tribe are
20 on Indian or non-Indian land. In *Montana*, the central issue was whether the tribe could
21 apply tribal law to nonmembers *on non-Indian land*. 450 U.S. at 547.

22 Plaintiffs argue the *Montana* rule governs regardless of the classification of the
23 land here. First, Plaintiffs contend that the general rule of *Montana* applies because the
24 land NGS operates on is non-Indian land for purposes of tribal regulation due to the § 323
25 Grant. (Doc. 162 at 14). In the alternative, Plaintiffs contend that even if the land was
26 not considered non-Indian fee land, the Supreme Court’s decision in *Nevada v. Hicks*
27 stands for a broad interpretation of *Montana*, where the general rule of *Montana* applies
28 to nonmembers on both Indian and non-Indian land. (*Id.* at 6); (Doc. 175 at 5).

 Plaintiffs’ argument is not unfounded. The Supreme Court explicitly stated in
Hicks that the reasoning in *Montana* “clearly impl[ies] that the general rule of *Montana*

1 applies to both Indian and non-Indian land.” *Nevada v. Hicks*, 533 U.S. 353, 359-360
2 (2001). In spite of this apparently clear language, the Ninth Circuit Court of Appeals’
3 *per curiam* holding in *Water Wheel Camp Recreational Area v. LaRance*, 642 F.3d 802
4 (9th Cir. 2011), cannot be disregarded by the Court.

5 In *Water Wheel*, the Court of Appeals found that the holding in *Hicks* still allowed
6 only a narrow interpretation of the general rule in *Montana*, where it applied only on non-
7 Indian land. The *Water Wheel* Court explained:

8 Even though in its analysis the [Supreme] Court
9 interpreted *Montana* broadly as applying to both Indian and
10 non-Indian land, the Court explicitly recognized that in some
11 cases, land ownership “may sometimes be a dispositive
12 factor” in establishing a tribal court’s regulatory jurisdiction
13 over non-Indians. *Hicks*, 533 U.S. at 360. *Hicks* expressly
14 limited its holding to “the question of tribal-court jurisdiction
15 over state officers enforcing state law” and left open the
16 question of tribal court jurisdiction over nonmember
17 defendants generally. *Id.* at 358 n.2; *id.* at 371 (noting that
the issue being considered concerned “a narrow category of
outsiders”). Furthermore, the Court did not overrule its own
precedent specifying that *Montana* ordinarily applies only to
non-Indian land.

18 We have recognized the limited applicability of *Hicks*.
19 See *McDonald v. Means*, 309 F.3d 530, 540 n.9 (9th Cir.
20 2002) (rejecting the argument that *Montana* should be
21 extended to bar tribal jurisdiction over the conduct of non-
22 Indians on tribal land because doing so would be inconsistent
23 with *Montana*’s narrow holding and “[e]ven if *Hicks* could be
24 interpreted as suggesting that the *Montana* rule is more
generally applicable than either *Montana* or *Strate* have
allowed, *Hicks* makes no claim that it modifies or overrules
Montana”)

25 To summarize, Supreme Court and Ninth Circuit
26 precedent, as well as the principle that only Congress may
27 limit a tribe’s sovereign authority, suggest that *Hicks* is best
28 understood as the narrow decision it explicitly claims to be.
See *Hicks*, 533 U.S. at 358 n.2. Its application of *Montana* to
a jurisdictional question arising on tribal land should apply

1 only when the specific concerns at issue in that case exist.
2 Because none of those circumstances exist here, we must
3 follow precedent that limits *Montana* to cases arising on non-
4 Indian land. Doing otherwise would impermissibly broaden
5 *Montana*'s scope beyond what any precedent requires and
6 restrain tribal sovereign authority despite Congress's clearly
7 stated federal interest in promoting tribal self-government.
8 See *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324,
9 335–36 (1983) (recognizing that as a “necessary implication”
10 of Congress's broad commitment to further tribal self-
government, “tribes have the power to manage the use of
[their] territory and resources by both members and
nonmembers, to undertake and regulate economic activity
within the reservation, and to defray the cost of governmental
services by levying taxes” (internal citations omitted)).

11 642 F.3d at 813-814.

12 Making the matter even more elusive, in a recent opinion involving a nonmember
13 bringing a tort claim against a tribal business on Indian land, another judge in this Court
14 invoked the Supremacy Clause of the United States Constitution to find that *Montana* did
15 in fact govern on Indian and non-Indian land alike. *Rolling Frito-Lay Sales LP v. Stover*,
16 No. CV 11–1361, 2012 WL 252938, at *3 (D. Ariz. Jan. 26, 2012) (“To the extent that
17 the *per curiam* opinion in *Water Wheel* departs from Supreme Court jurisprudence in the
18 area of Federal Indian Law, we are constrained by the Supremacy Clause, Art. VI, and
19 Article III (‘one supreme Court’) to follow the Supreme Court. See *Thurston Motor*
20 *Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983). We thus apply *Montana* to
21 this case.”) Given this setting, the Court declines to wade into an unnecessary analysis of
22 whether *Montana* applies on both Indian and non-Indian fee land.

23 In this case, whether *Montana* applies or not is irrelevant because of the exception
24 the Supreme Court delineated in *Montana* and the consensual relationship between the
25 parties here which fulfills that exception. If an exception to *Montana* applies, then
26 regardless of whether this Court were to find that *Montana* governs on non-Indian fee
27 land only (as Defendants claim) or Indian and non-Indian land alike (as Plaintiffs claim),
28 the result would be the same—the tribe would have the sovereign authority at issue. If

1 the tribe has the sovereign authority to regulate employment, the only question is whether
 2 this authority was waived. Thus, the *sine qua non* at this point is not whether *Montana*
 3 applies, it is whether an exception to *Montana* would apply, and the Court finds that the
 4 first *Montana* exception would apply.

5 **b. The First *Montana* Exception Would Apply**

6 Assuming arguendo, that *Montana* applies on Indian land and no valid reason
 7 exists to classify the land at issue as non-Indian fee land, the tribe cannot regulate the
 8 activities of a nonmember on their reservations or on non-Indian fee land *unless* the
 9 nonmember has entered into a “consensual relationship with the tribe or its members.”
 10 *Montana*, 450 U.S. at 565-566 (explaining the first *Montana* exception). Given that this
 11 rule from *Montana* is a general rule,

12 efforts by a tribe to regulate nonmembers, especially on non-
 13 Indian fee land, are “presumptively invalid.” The burden
 14 rests on the tribe to establish one of the exceptions to
 15 *Montana*’s general rule that would allow an extension of
 16 tribal authority to regulate nonmembers These
 exceptions are “limited” ones and cannot be construed in a
 manner that would “swallow the rule,” or “severely shrink” it.

17 *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008)
 18 (citations omitted).

19 Subsequent decisions by the Supreme Court have clarified the types of regulations
 20 and consensual relationships that fulfill the first *Montana* exception. First, “[t]he
 21 consensual relationship must stem from ‘commercial dealing, contracts, leases, or other
 22 arrangements.’” *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 655 (2001) (quoting
 23 *Montana*, 450 U.S. at 565). This type of relationship establishes consent by a
 24 nonmember to be governed by tribal law. Consent alone, however, is not enough. *See*
 25 *Plains*, 554 U.S. at 337.

26 Second, “*Montana*’s consensual relationship exception requires that the . . .
 27 regulation imposed by the Indian tribe have a nexus to the consensual relationship itself .
 28 . . . A nonmember’s consensual relationship in one area thus does not trigger tribal civil

1 authority in another—it is not in for a penny, in for a pound.” *Atkinson*, 532 U.S. at 656
 2 (citation omitted); *see also Atkinson Trading Co., Inc. v. Manygoats*, No. CIV 02–1556,
 3 2004 WL 5215491, at *8 (D. Ariz. Mar. 17, 2004) (finding “a nexus requirement analysis
 4 is only necessary if the Court first finds that a consensual relationship, as contemplated
 5 by the *Montana* Court, exists.”).

6 Finally, the regulation must “be justified by reference to the tribe’s sovereign
 7 interests.” *Plains Commerce Bank*, 554 U.S. at 336. Put another way, after a qualifying
 8 consensual relationship is established, “even then, the regulation must stem from the
 9 tribe’s inherent sovereign authority to set conditions on entry, preserve tribal self-
 10 government, or control internal relations.” *Id.* at 337. The Supreme Court explained:

11 certain forms of nonmember behavior, even on non-Indian fee
 12 land, may sufficiently affect the tribe as to justify tribal
 13 oversight. While tribes generally have no interest in
 14 regulating the conduct of nonmembers, then, they may
 15 regulate nonmember behavior that implicates tribal
 16 governance and internal relations. The regulations we have
 approved under *Montana* all flow directly from these limited
 sovereign interests.

17 *Id.* at 335.

18 Thus, the Court must look to whether Defendants have shown (1) that the
 19 relationship stems from commercial dealing, a contract, or a lease; (2) that the regulation
 20 has a nexus to the relationship; and (3) that regulating employment stems from the tribe’s
 21 authority to set conditions on entry, preserve tribal self-government, or control internal
 22 relations.

23 **i. The Consensual Relationship Stems from** 24 **Commercial Dealing**

25 To establish that the first *Montana* exception applies, Defendants argue that “[t]he
 26 1969 Lease is exactly the kind of consensual relationship that the *Montana* Court
 27 considered when creating the first exception to its general rule.” (Doc. 165 at 7). In
 28 determining if Defendants’ argument meets their burden, “the Court may not simply use

1 the plain meaning definition of the word ‘consensual’ here. Instead, the Court must
2 determine whether the relationship was ‘consensual’ as contemplated by the Supreme
3 Court when it created the *Montana* exceptions.” *Manygoats*, 2004 WL 5215491, at *9.

4 Defendants point out that the very language used by the *Montana* court clearly
5 encompasses commercial contracts and leases as the type of consensual relationship
6 needed for the exception. (Doc. 165 at 7). The Court notes that the Supreme Court’s
7 description of what meets the first *Montana* exception goes even further than commercial
8 contracts and leases by contemplating unspecified other arrangements that would still
9 give the tribe the authority to regulate nonmembers on Indian and non-Indian fee land.
10 *Montana*, 450 U.S. at 565 (“A tribe may regulate, through . . . other means, the activities
11 of nonmembers who enter consensual relationship with the tribe or its members, through
12 commercial dealing . . . or other arrangements.”).

13 Any of these types of relationships establish the consent required under *Montana*.
14 To say that Plaintiffs have not entered into a consensual relationship contemplated by
15 *Montana* would mean that the contractual lease between SRP and the Navajo Nation, that
16 Plaintiffs themselves repeatedly refer to as a lease and seek to interpret as a binding
17 contract, is not actually a contract, lease, or other arrangement in spite of the plain
18 meaning of the words. The language of the *Montana* court is unambiguous and, without
19 something more, the Court declines to give new meaning to patently clear words.

20 Plaintiffs argue that another judge in this Court rejected this same argument for
21 consent in *Manygoats*, where the court said “[a]n employment relationship is a
22 consensual relationship in the sense that the employer consents to the employee working
23 at the establishment. . . . The consent required to trigger the first *Montana* exception,
24 however, requires much more. *Montana* requires consent to jurisdiction, either
25 expressed, or implied by the parties’ behavior.” (Doc. 175 at 13) (quoting *Manygoats*,
26 2004 WL 5215491, at *9). In that case, unlike the case at bar, there was no contract
27 between the nonmember employer and member employee and, even more importantly,
28 no contract existed between the nonmember employer and the tribe itself. The court’s

1 explanation in *Manygoats* highlights these key differences. There, the court said it “finds
2 that the employment of a tribal member, by itself, is not enough to invoke jurisdiction of
3 the tribe as a matter of law an employer who does nothing to subject himself to tribal
4 jurisdiction other than hiring a tribal member has not expressly or impliedly consented to
5 jurisdiction.”

6 Plaintiffs in this case have done far more than merely employ tribal members.
7 Unlike the employer in *Manygoats*, SRP has entered into a contract/lease for commercial
8 dealing with the tribe itself. Accordingly, the Court finds Defendants have met their
9 initial burden under the qualification in *Atkinson* and shown that the consensual
10 relationship here stems from the requisite commercial dealing. *See* 532 U.S. at 655 (the
11 consensual relationship must stem from commercial dealing, a contract, or a lease).

12 **ii. The Regulation has a Nexus to the Consensual**
13 **Relationship**

14 Defendants, however, must also establish that the regulation they seek to impose
15 has a nexus to the consensual relationship itself. *See id.* at 656. The Court must ensure
16 the exception does not “swallow” the general rule or “severely shrink” it. *See Plains*
17 *Commerce Bank*, 554 U.S. at 330. Defendants seek to impose the regulatory scheme of
18 the NPEA on Plaintiffs. Accordingly, the NPEA must have a nexus to the subject matter
19 of the 1969 Lease. *See Water Wheel*, 642 F.3d at 817 (upholding the district court’s
20 finding that the non-Indian corporation’s long term business lease with the tribe for the
21 use of tribal property established a consensual relationship and that the tribe’s eviction
22 action bore a close nexus to that relationship).

23 The 1969 Lease is more than just an agreement that Plaintiffs will rent tribal land,
24 the lease explicitly deals with employment and operations at NGS. As Defendants
25 explain, the 1969 Lease addresses employment of tribal members by giving them
26 preference in hiring at NGS thus establishing the nexus required. (Doc. 165 at 8).
27 Further, the very language Plaintiffs rely on to show that the tribe has waived their right
28

1 to regulate employment establishes the nexus required.¹ Under Plaintiffs’ own argument,
 2 the non-regulation covenant must have a nexus to employment in order to waive the
 3 tribe’s right to regulate employment. (*See id.* at 12). The Court finds this evidence
 4 sufficient to show that tribal employment regulations bear a close enough nexus to a lease
 5 that addresses employment and operations at NGS.

6 **iii. Regulating Employment Implicates Sovereign** 7 **Authority**

8 Finally, any regulation the tribe seeks to enforce must come “from the tribe’s
 9 inherent sovereign authority to set conditions on entry, preserve tribal self-government,
 10 or control internal relations.” *Plains Commerce Bank*, 554 U.S. at 337. The Court then
 11 must determine if regulating employment implicates the tribe’s sovereign authority to
 12 control internal relations. The Court finds it does.

13 In explaining the extent of *Montana* and its exceptions, the Supreme Court said in
 14 *Plains Commerce Bank*, “[t]he logic of *Montana* is that certain activities on non-Indian
 15 fee land (say, a *business enterprise employing tribal members*) . . . may intrude on the
 16 internal relations of the tribe or threaten tribal self-rule. To the extent they do, such
 17 activities . . . may be regulated.” *Id.* at 334-335 (emphasis added). The Court notes that
 18 this statement by the Supreme Court applied to non-Indian land. Logically, a business
 19 enterprise employing tribal members on Indian land would affect the internal relations of
 20 a tribe even more and give the tribe the inherent sovereign authority to regulate
 21 employment at an even lower threshold.

22 In *FMC v. Shoshone-Bannock Tribes*, the Ninth Circuit Court of Appeals found
 23 that the first *Montana* exception applied and the tribe could regulate the employment
 24 practices of a non-Indian employer employing tribal members on non-Indian fee land.
 25 905 F.2d 1311, 1314-1315 (9th Cir. 1990). In making this decision, the Court of Appeals

26
 27 ¹ Plaintiffs argue the non-regulation covenant waives the tribe’s right to regulate
 28 employment because it explicitly says “[the tribe] will not directly or indirectly regulate
 or attempt to regulate [Participants] in the . . . operation of [NGS] . . .”. (Doc. 162 at 3).

1 found the tribe had the inherent sovereign authority to regulate employment because,
2 among other connections to the tribe, the employer had signed a contract relating to
3 employment and employed merely a few tribal members. *Id.* Accordingly, both the
4 Supreme Court and Court of Appeals consider the employment of tribal members by a
5 non-Indian employer, especially on tribal land, may implicate the tribe's sovereign
6 authority to control internal relations and thus fulfills the first exception of *Montana*.

7 The Court finds no compelling argument why the relationship between the Navajo
8 Nation and Plaintiffs here does not support the same conclusion. Like the employer in
9 *FMC*, Plaintiffs clearly signed a contract that involves employment of tribal members.
10 Further, by SRP's own admission at oral arguments held on January 9, 2012, 84% of
11 SRP's employees are Navajo tribal members. Consequently, the Court finds Plaintiffs
12 are a business enterprise with enough substantial connections to the tribe to intrude on
13 internal relations and thus the Tribe has the inherent sovereign authority to regulate
14 employment.

15 2. Waiver of Sovereign Authority

16 As the Court has explained, the Navajo Nation has the right to regulate
17 employment at NGS regardless of whether or not *Montana* applies to Indian or non-
18 Indian land. Accordingly, the central issue before the Court is the same issue that the
19 Ninth Circuit Court of Appeals addressed in *Arizona Public Service Co. v. Aspaas*—
20 “whether the Navajo Nation has agreed to a valid waiver of such right.” 77 F.3d 1128,
21 1134 (9th Cir. 1996). Like the Court of Appeals found in *Aspaas*, the Court finds that the
22 Navajo Nation agreed in the 1969 Lease to waive its sovereign authority to regulate
23 employment at NGS.

24 Indian tribes are sovereigns that can waive their sovereign powers. The United
25 States Supreme Court has held federal, state, local and Indian sovereigns:

26 can waive sovereign power if they do so in sufficiently clear
27 contractual terms:

28 Each of these governments has different attributes of
sovereignty, which also derive from different sources. These

differences, however, do not alter the principles for determining whether any of these governments has waived its sovereign power through contract, and we perceive no principled reason for holding that the different attributes of Indian sovereignty require different treatment in this regard. Without regard to its source, sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign jurisdiction, and will remain intact unless surrendered in unmistakable terms.

Id. (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982)).

If a sovereign power is waived, it must be done so clearly. If the sovereign power is not waived in unmistakable terms, the contract remains subject to subsequent legislation by the sovereign. *Bowen v. Public Agencies Opposed to Social Sec. Entrapment*, 477 U.S. 41, 52 (1986) (quoting *Merrion*, 455 U.S. at 147). Consequently, the contract between SRP and the Navajo Nation must evince the requisite “unmistakable waiver” by tribal officials. To make this determination, the Court must evaluate the 1969 Lease. Defendants, however, have raised two arguments that they insist bar the Court from interpreting this contract. The Court will now address these arguments.

a. Interpretation of the 1969 Lease is Appropriate

i. *Ex Parte Young* Allows Defendants to Stand in the Place of a Party to this Contract

First, Defendants argue that this Court cannot rule on whether the Navajo Nation waived its sovereign authority in the contract because that argument involves the interpretation of the 1969 Lease to which the Navajo Nation is a party and the Navajo Nation is not a party to this suit. (Doc. 165 at 13-15). Summing up their argument, Defendants argue this would violate fundamental contract law and they ask the Court to limit the scope of this case to only those parts arising under *Ex parte Young* and to forego any interpretation of the 1969 Lease. (*Id.* at 15).

When this case was previously on appeal to the Ninth Circuit Court of Appeals,

1 the court explained that the *Ex parte Young* “doctrine permits actions for prospective
 2 non-monetary relief against state or tribal officials in their official capacity to enjoin them
 3 from violating federal law, without the presence of the immune State or tribe.” *SRP II*,
 4 672 F.3d at 1181. The Court of Appeals then clearly placed this case within the ambit of
 5 *Ex parte Young* explaining that interpreting the 1969 Lease is a question of federal law
 6 and “*Ex parte Young* . . . applies to federal common law as well.” *Id.* at 1182; *see also id.*
 7 at 1181-1182 (“federal common law governs whether an Indian tribe’s lease with a non-
 8 Indian has waived the tribe’s authority to regulate the non-Indian’s activities.”). Thus,
 9 Defendants are asking the Court to do the impossible—forego interpretation of the 1969
 10 Lease, but adjudicate the parts of this case arising under *Ex parte Young*. The two issues
 11 cannot be separated. The parts of this action arising under *Ex parte Young* wholly
 12 include interpreting the 1969 Lease to determine if the tribe waived its authority. While
 13 the Navajo Nation is not a party to this suit, the Navajo official defendants sufficiently
 14 represent the tribe’s interests to allow interpretation of the 1969 Lease.

15 Further, as Plaintiffs point out, the Court of Appeals addressed and ruled on the
 16 signatory issue in *SRP II* as well. (Doc. 175 at 22). The court held:

17 Here, the Navajo official defendants can be expected to
 18 adequately represent the Navajo Nation’s interests. . . . there
 19 is no indication that the tribe would offer any necessary
 20 element to the action that the Navajo official defendants
 would neglect. . . .

21 Indeed, the Navajo official defendants do not argue
 22 otherwise. Instead, they argue only that ***the tribe***
 23 ***automatically is a necessary party to any action challenging***
 24 ***a lease to which the tribe is a signatory***, citing *Dawavendewa*
 25 *v. Salt River Project*, 276 F.3d 1150 (9th Cir. 2002). But
Dawavendewa is distinguishable because there—unlike
 here—the tribal officials were *not* parties to the action and
 thus could not represent the absent tribe’s interests

26 Thus, because the officials adequately represent the
 27 Navajo Nation’s interests here, the district court erred in
 28 holding the tribe was a necessary party under Rule
 19(a)(1)(B)(i).

1

2 . . . [t]he Navajo Nation is not a necessary party under
3 Rule 19(a)(1)(B)(i) because the officials adequately represent
4 the tribe's interests.

5 *SRP II*, 672 F.3d at 1180-1181 (citations omitted) (emphasis added). Accordingly, the
6 Court finds that under the *Ex parte Young* doctrine, because the Navajo official
7 defendants are a party here, the Navajo Nation does not have to be a party to this action
8 and interpreting the 1969 Lease is appropriate.

9 **ii. Tribal Council had the Authority to Waive the**
10 **Tribe's Authority**

11 Second, Defendants argue that the Court cannot interpret the 1969 Lease because
12 the Navajo Nation Supreme Court held under Navajo law that the Advisory Committee of
13 the Navajo Tribal Council, which approved and signed the 1969 Lease, had no authority
14 in 1969 to waive the tribe's sovereign power to regulate employment at NGS. (Doc. 165
15 at 18). Defendants contend that this Court is bound by and must give deference to the
16 Navajo Nation Supreme Court's finding of Navajo law. (*Id.* at 19).

17 Defendants' argument raises two issues: first, whether the Tribal Council actually
18 had the authority to waive the tribe's authority to regulate employment; and second,
19 whether determining if the council's authority includes the power to waive the tribe's
20 authority is an issue of tribal law solely determinable by the Navajo courts.

21 The Ninth Circuit Court of Appeals explicitly addressed both issues in *Aspaas*. In
22 *Aspaas*, Arizona Public Service Company ("APS") signed a lease in 1960 with the
23 Navajo Nation to operate the Four Corners Power Plant ("FCPP") on tribal trust land
24 located in New Mexico. 77 F.3d at 1129. The Navajo Tribal Council approved the terms
25 of the lease for the Navajo Nation. *Id.* at 1135. After the NPEA was passed in 1985, the
26 ONLR initiated proceedings against APS for violating provisions of the NPEA by APS's
27 employment policies. *Id.* at 1131. The Navajo Nation Supreme Court eventually held in
28 favor of the tribe. *Id.* APS then filed a claim for declaratory and injunctive relief in the

1 district court. *Id.* The district court granted summary judgment for APS holding that the
2 terms of the lease between APS and the Navajo Nation unmistakably waived the tribe's
3 sovereign power to regulate employment at APS. *Id.* at 1132. The Court of Appeals
4 affirmed the district court's decision. *Id.* at 1135.

5 With respect to the two issues at hand in this case, first, the Court of Appeals
6 clearly held in *Aspaas* that the Navajo Tribal Council had the authority in 1960 to waive
7 the tribe's right to regulate employment at the FCPP. The *Aspaas* court explained:

8 The [Navajo official defendants] further contend that the
9 Navajo Tribal Council, which approved the operative
10 documents here (and later enacted the NPEA), lacked
11 authority to waive sovereign police power in lease
12 agreements. This position is untenable. As the governing
13 body of the Navajo Nation, the Navajo Tribal Council is
14 similar in function to the Congress of the United States. The
15 legitimacy of the Navajo Tribal Council, the freely elected
16 governing body of the Navajos, is beyond question. Thus, the
17 Navajo Tribal Council had authority to effect a waiver of the
18 Navajo Nation's power to subject a lessee to employment
19 regulations.

20 *Id.* at 1135. Accordingly, because no evidence has been presented showing that the
21 power of the Navajo Tribal Council changed between 1960 and 1969, the Court finds that
22 the Navajo Tribal Council also had the authority in 1969 to waive the Navajo Nation's
23 sovereign authority to regulate employment at NGS.

24 Second, the Court of Appeals held that determining the limits of the Council's
25 authority to waive regulation of a non-Indian was not an issue of tribal contract law
26 determinable by the Navajo Nation Supreme Court, but an issue of federal common law
27 properly before the federal courts. *Id.* at 1132.

28 As Plaintiffs point out, the procedural history of *Aspaas* mirrors the history of this
case. In *Aspaas*, prior to being ruled on by the district court, the Navajo Nation Supreme
Court also held that as a matter of Navajo law, the Navajo Tribal Council lacked the
authority in 1960 to waive the tribe's right to regulate employment at the FCPP. (Doc.

163 at 13 ¶ 64). The Navajo Nation then made the same argument in *Aspaas* that it makes here—that this was solely an issue of Navajo law. (*Id.* at 14 ¶ 65). The district court in *Aspaas* held, and the Court of Appeals affirmed, that the issue of whether the tribal council could waive the tribe’s sovereign authority to regulate employment was not a matter of Navajo law, but a matter of federal law. (*Id.* at 14 ¶ 66); *Aspaas*, 77 F.3d at 1132, 1135 (recognizing the issue was not governed by tribal contract law but by federal common law and affirming the district court’s holding). Given the holding in *Aspaas*, the Court finds that deciding whether the tribal council had the authority to waive the tribe’s sovereign authority to regulate a non-Indian is an issue of federal law properly determinable by this Court. Therefore, because the Tribal Council had the authority to waive the Tribe’s sovereign authority and because this determination is an issue of federal law, interpretation of the 1969 Lease is appropriate.

b. The Tribe Waived its Sovereign Authority in Unmistakable Terms

Finally, the Court turns to whether the Navajo Nation has waived its sovereign authority to regulate employment in unmistakable terms. The parties disagree on whether the 1969 Lease unambiguously waives the tribe’s sovereign authority. Both parties have moved for summary judgment based in large part on this issue. (Doc. 162 at 16-17); (Doc. 165 at 15-17).

i. Summary Judgment is Appropriate

Summary judgment, however, is only warranted when the remaining issues at hand are solely questions of law. The Court finds that interpreting the 1969 Lease to determine if it waives the tribe’s authority is a question of law.

Summary judgment is appropriate when “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). “A party asserting that a fact cannot be or is genuinely disputed must support that assertion by . . . citing to particular parts of materials in the record,” or by “showing that materials cited do not establish the absence or presence of a

1 genuine dispute, or that an adverse party cannot produce admissible evidence to support
2 the fact.” *Id.* 56(c)(1)(A)&(B). Thus, summary judgment is mandated “against a party
3 who fails to make a showing sufficient to establish the existence of an element essential
4 to that party’s case, and on which that party will bear the burden of proof at trial.”
5 *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

6 Initially, the movant bears the burden of pointing out to the Court the basis for the
7 motion and the elements of the causes of action upon which the non-movant will be
8 unable to establish a genuine issue of material fact. *Id.* at 323. The burden then shifts to
9 the non-movant to establish the existence of material fact. *Id.* The non-movant “must do
10 more than simply show that there is some metaphysical doubt as to the material facts” by
11 “com[ing] forward with ‘specific facts showing that there is a *genuine* issue for trial.’”
12 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986) (quoting
13 Fed. R. Civ. P. 56(e) (1963) (amended 2010)). In the summary judgment context, the
14 Court construes all disputed facts in the light most favorable to the non-moving party.
15 *Ellison v. Robertson*, 357 F.3d 1072, 1075 (9th Cir. 2004).

16 The mere existence of some alleged factual dispute between the parties will not
17 defeat an otherwise properly supported motion for summary judgment; the requirement is
18 that there be no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S.
19 242, 247-248 (1986). A material fact is any factual issue that might affect the outcome of
20 the case under the governing substantive law. *Id.* at 248. A material fact is “genuine” if
21 the evidence is such that a reasonable jury could return a verdict for the non-moving
22 party. *Id.*

23 At the summary judgment stage, the trial judge’s function is to determine whether
24 there is a genuine issue for trial. There is no issue for trial unless there is sufficient
25 evidence favoring the non-moving party for a jury to return a verdict for that party. *Id.* at
26 249-250. If the evidence is merely colorable or is not significantly probative, the judge
27 may grant summary judgment. *Id.*

28 “In contract cases, summary judgment is appropriate only if the contract or

1 contract provision in question is unambiguous.” *Castaneda v. Dura-Vent Corp.*, 648
2 F.2d 612, 619 (9th Cir. 1981). A contract is rendered ambiguous if there is more than
3 one plausible meaning or if it is reasonably subject to various interpretations. *Id.*
4 However, mere disagreement by the parties of a contract’s meaning does not render it
5 ambiguous. *Kennewick Irr. Dist. v. United States*, 880 F.2d 1018, 1032 (9th Cir. 1989).
6 Ambiguity is also not established if the alternate interpretation is a “strained” rather than
7 a reasonable view. *Tzung v. State Farm Fire and Casualty Co.*, 873 F.2d 1338, 1340 (9th
8 Cir. 1989); *see also Shakey’s Inc. v. Covalt*, 704 F.2d 426, 434 (9th Cir. 1983)
9 (“Preference must be given to reasonable interpretations as opposed to those that are
10 unreasonable . . .”).

11 “A written contract must be read as a whole and every part interpreted with
12 reference to the whole.” *Shakey’s*, 704 F.2d at 434. Generally, the words of a contract
13 must be given their plain and ordinary meaning. Restatement (Second) of Contracts §
14 202(3) cmt. e (1981). In some cases, however, words which are used in an industrial
15 setting should be given the definition accorded to them by the industry in which they are
16 being used. *Pacific Portland Cement Co. v. Food Machinery & Chemical Corp.*, 178
17 F.2d 541, 552 (9th Cir. 1949).

18 Further, in interpreting a contract the Court must determine whether or not
19 considering extrinsic evidence is appropriate at the summary judgment stage.
20 Interpreting the 1969 Lease is a matter of federal substantive law because “[f]ederal law
21 controls the interpretation of a contract. . . . entered into pursuant to authority conferred
22 by federal statute and, ultimately the Constitution. *United States v. Seckinger*, 397 U.S.
23 203, 209-10 (1970). Section 39 of the 1969 Lease says that the lease was entered into
24 subject to the existing applicable regulations of the Department of the Interior contained
25 in title 25 of the Code of Federal Regulations, which are codified in relevant part at 25
26 U.S.C. § 415. (Doc. 5 Ex. 3 at 34-35). This statute provides for the Secretary of
27 Interior’s approval of Indian leases. *See* 25 U.S.C. § 415. Accordingly, federal law
28 governs here.

1 “For guidance, [the Court] may look to general principles for interpreting
 2 contracts.” *Kennewick Irr. Dist.*, 880 F.2d at 1032 (quoting *Saavedra v. Donovan*, 700
 3 F.2d 496, 498 (9th Cir.), cert. denied, 464 U.S. 892 (1983)). Under traditional contract
 4 principles, extrinsic evidence is inadmissible to interpret, vary or add to the terms of an
 5 unambiguous integrated written instrument. *Trident Center v. Connecticut General Life*
 6 *Ins. Co.*, 847 F.2d 564, 568 (9th Cir. 1988). The question for the Court then is whether
 7 the terms of the 1969 Lease are unambiguous.

8 In this case, both of the parties have competing interpretations of what the 1969
 9 Lease says. Section 16 of the 1969 Lease reads in its entirety:

10 16. Operation of Navajo Generation Station. The Tribe
 11 covenants that, other than as expressly set out in this Lease, it
 12 will not directly or indirectly regulate or attempt to regulate
 13 the Lessees in the construction, maintenance or operation of
 14 the Navajo Generation Station and the transmission systems
 15 of the Lessees, or the construction, maintenance or operation
 16 of the fuel transportation system of the Lessees or the fuel
 17 Transporter. This covenant shall not be deemed a waiver of
 18 whatever rights the Tribe may have to regulate retail
 distribution of electricity on the Reservation Lands. Nothing
 herein shall convey to the Lessees, or any of them, any rights
 to engage in retail distribution of electricity on Reservation
 Lands.

19 (Doc. 5 Ex. 1 at 9-10). The operative words, “other than as expressly set out in this
 20 Lease,” automatically incorporate other provisions of the 1969 Lease into interpreting
 21 this clause. In section 18 the parties agreed that:

22 18. Employment of Navajos. Lessees agree to give
 23 preference in employment to qualified local Navajos, it being
 24 understood that “local Navajos” means members of the
 25 Navajo Tribe living on the land within the jurisdiction of the
 Navajo Tribe. . . .

26 (Doc. 5 Ex. 1 at 10). The parties do not argue that any other parts of the 1969 Lease
 27 affect the meaning of section 16 with respect to this case.

28 The central issue is the interpretation of the word “operation” and whether it

1 encompasses employment policies. Plaintiffs argue that the language of section 16,
2 “other than as expressly set out in this Lease, [the Tribe] will not directly or indirectly
3 regulate or attempt to regulate the Lessees in the . . . operation of [NGS],” explicitly
4 waives Defendants’ authority to regulate employment practices at NGS. (Doc. 162 at
5 17); (Doc. 175 at 23-24). Defendants argue that section 16 does not waive the tribe’s
6 authority and that section 18 confirms that section 16 was not intended to be a waiver of
7 the tribe’s right to regulate employment because the parties separately considered and
8 negotiated employment issues in section 18. (Doc. 165 at 16); (Doc. 181 at 7).
9 Consequently, the parties’ arguments center on the 1969 Lease itself.

10 The only reference by either party to evidence beyond the 1969 Lease is when
11 Defendants argue in their Response that SRP’s actions, taken eighteen years after the
12 1969 Lease was signed, proves that the NPEA specifies what section 18 means. (Doc.
13 165 at 16-17). The Court finds that the lease is clear and unambiguous in its terms.
14 Thus, under the parol evidence rule, Defendants may not introduce evidence to contradict
15 plain and unambiguous terms. Even if the Court were to consider parol evidence to
16 interpret the terms, the extrinsic evidence here has no bearing on whether section 16 was
17 intended in 1969 to include employment policies at NGS.²

18 ² In 1986, the ONLR filed a separate complaint than the one in this case with the
19 NNLC against SRP for violating provisions of the NPEA. (Doc. 168-1 Ex. 1 at 10). The
20 case was settled between the parties. (*Id.*)

21 As part of that settlement, SRP developed the Navajo Generating Station
22 Preference Plan (the “Plan”). (Doc. 5-6 Ex. 3). The stated purpose of the Plan was to
23 “clarify and delineate [SRP’s] Affirmative Action Program for [NGS] and specifically
24 the procedures for giving preference in employment to Indians.” (*Id.* at 4). The Plan lays
25 out how SRP will specifically give preference to Navajo members for skilled and
unskilled positions. The Plan makes no reference to the 1969 Lease or any provisions of
the lease, makes no reference to how SRP handled employment matters with Navajos
prior to 1986, nor does the Plan make any reference to the NPEA.

26 Defendants, however, claim the Plan proves that the parties agree that the NPEA,
27 and not the Plan, defines what section 18 means and that SRP’s actions (i.e. developing
the Plan) demonstrate that section 18 has force and meaning. (Doc. 162 at 16-17).

28 The Court finds this evidence and Defendants’ argument is irrelevant to the

1 While both parties contend that the word “operation” means different things, this
 2 does not automatically make the word “operation” ambiguous and foreclose a
 3 determination of summary judgment. *See Kennewick Irr. Dist.*, 880 F.2d at 1032 (“mere
 4 disagreement by the parties of a contract’s meaning does not render it ambiguous.”). The
 5 Court finds the meaning of the term “operation” is unmistakably clear by considering the
 6 contract as a whole. Therefore, the interpretation of the terms of the 1969 Lease is a
 7 question of law and summary judgment is appropriate.

8 **ii. The Term “Operation” Unmistakably Included**
 9 **Employment Policies**

10 The 1969 Lease waived the Navajo Nation’s sovereign power in unambiguous and
 11 unmistakable terms. In section 16 of the 1969 Lease, it reads,

12 The Tribe covenants that, other than as expressly set out in
 13 this Lease, it will not directly or indirectly regulate or attempt
 14 to regulate the Lessees in the construction, maintenance or
 15 operation of the Navajo Generation Station and the
 16 transmission systems of the Lessees, or the construction,
 maintenance or operation of the fuel transportation system of
 the Lessees or the fuel Transporter.

17 In considering the 1969 Lease on its face, with no explanation to the contrary, the Court
 18 would read the term “operation” and understand it to mean how NGS is run, or operated.
 19 The Court’s initial interpretation of this term is supported by the common definition of
 20

21 ultimate issue. Even if the Court were to consider this extrinsic evidence for its bearing
 22 on the 1969 Lease it would only support a contention that the parties subsequently agreed
 23 to implementation of the NPEA. The issue here for considering whether summary
 24 judgment is warranted is whether the Navajo Nation unmistakably waived its sovereign
 25 authority in 1969—specifically whether the term “operation” includes employment
 26 policies. The issue is not whether the parties agreed eighteen years after the lease was
 27 signed that the NPEA defines what section 18 means. Even if it were considered, this
 28 extrinsic evidence does not create a genuine issue of material fact at the summary
 judgment stage. Accordingly, the Court need only look to the four corners of the 1969
 Lease to determine that it unambiguously waives the tribe’s sovereign authority and
 therefore interpretation of the lease is a question of law determinable on summary
 judgment.

1 the word “operation.” According to the Oxford English Dictionary the primary
2 definitions of “operation” are “the exertion of force or influence; working, activity; a
3 manner of working, *the way in which a thing works.*” *Operation Definition*, OED.com,
4 <http://www.oed.com/view/Entry/131749?redirectedFrom=operation> (last visited Dec. 21,
5 2012) (emphasis added). The Court finds the “way in which [NGS] works” inherently
6 includes how people are hired to work, to run, to exert influence over, and to operate
7 NGS. *See id.* How people are chosen to work, run, or operate NGS, necessarily includes
8 employment policies governing these people.

9 Defendants’ arguments attempt to change this unambiguous meaning of the word
10 operation. Defendants argue that because the parties separately considered and
11 negotiated employment issues and SRP agreed to give employment preferences to
12 Navajos in section 18, this confirms that section 16 was not intended to include the tribe’s
13 right to regulate employment. (Doc. 165 at 16); (Doc. 181 at 7). The Court does not
14 agree with this argument.

15 The clear words of section 16—“other than as expressly set out in this Lease”—
16 makes Defendants’ argument, that employment was separately discussed, actually
17 support the conclusion that section 16 included employment. By making their argument,
18 Defendants inherently admit that section 16 would include employment if section 18 did
19 not exist because of the words “other than as expressly set out.” In other words,
20 Defendants are essentially arguing that because section 18 separately addresses
21 employment, the subject of employment is not included in or is taken out of the ambit of
22 section 16. If section 16 inherently includes employment, separately addressing
23 employment policies in section 18 does not logically remove all employment policies
24 from the broad term “operation” as used in section 16. To the contrary, the fact that
25 detailed employment policies are “expressly set out in [the] Lease” convinces the Court
26 that the Navajo Nation intended to relinquish power to regulate employment in section 16
27 except as expressed in section 18.

28 Defendants also contend that if section 16 was meant to include employment, and

1 the parties agreed that SRP would give employment preference to Navajos, that the
2 employment preference clause would have been included in section 16. (Doc. 165 at 16).
3 The Court does not agree with this conclusory statement.

4 Existence of the employment preference clause in section 18 does not indicate
5 intent to maintain sovereign power to regulate employment. The employment preference
6 clause merely shows that this was an important issue to the parties and that the parties
7 wished to memorialize their agreement on paper. The parties could have done that
8 anywhere in the contract, but chose to do it in a separate section. If anything, again, by
9 putting it in a separate section it shows that the tribe intended to surrender their sovereign
10 power in section 16 except as expressed in section 18. Accordingly, section 16
11 unmistakably included employment under the scope of the term “operation.”

12 Finally, Defendants argue that Plaintiffs’ reliance on the court’s interpretation of
13 the contract language in *Aspaas* actually proves the 1969 Lease did not waive the tribe’s
14 sovereign authority because of the differences between the two leases. (Doc. 165 at 17-
15 18). Defendants contend this Court should find the differences dispositive here. (Doc.
16 181 at 8).

17 In *Aspaas*, the district court held and the Ninth Circuit Court of Appeals affirmed,
18 that the Navajo Nation had unmistakably waived its sovereign power to regulate
19 employment at the FCPP by the terms of the lease signed in 1960, and the two
20 subsequent amendments to that lease signed in 1966 and 1985. *Aspaas*, 77 F.3d at 1131-
21 1132, 1135. The 1960 lease contained a non-regulation clause that was not materially
22 changed in either amendment and read:

23 The Tribe covenants that, other than as expressly set out in
24 this agreement, it will not directly or indirectly regulate or
25 attempt to regulate the Company or the construction,
26 maintenance or operation of the power plant and transmission
27 system by the Company, or its rates, charges, operating
practices, procedures, safety rules, or other policies or
practices.

28 *Id.* at 1130. The 1960 lease also included a general dispute resolution process similar to

1 the dispute resolution process of section 25 in the 1969 Lease involving the Secretary of
2 the Interior. *Id.* The 1960 lease and both amendments also included an employment
3 preference clause similar to section 18 of the 1969 Lease in this case.³ Further, the 1985
4 amendment incorporated a letter agreement that explained the employment preference
5 clause in more detail and provided a minitrial mechanism in the event of a dispute arising
6 out of the letter agreement. *Id.* at 1131 n.4.

7 The Court of Appeals held that these lease documents, in particular the non-
8 regulation clause and the letter agreement, demonstrated an unmistakable waiver by the
9 Navajo Nation. *Id.* at 1135. The Court of Appeals also noted that the minitrial
10 mechanism in the letter agreement for disputes arising from the employment preference
11 clause was “[o]f particular significance” in the holding because the record showed that
12 the tribe refused to abide by this mechanism and adopted the NPEA in order to bypass it.
13 *Id.*

14 In this case, it is undisputed that the 1969 Lease contains no letter agreement
15 further explaining the meaning of the employment preference clause (§ 18) and no
16 separate minitrial exists to adjudicate disputes arising from section 18. Further, section
17 16 clearly differs from the non-regulation clause in the 1960 lease in *Aspaas*.
18 Specifically, the 1960 lease in *Aspaas* included the conspicuous language that the tribe
19 will not regulate the operation of the power plant “or its rates, charges, operating
20 practices, procedures, safety rules, or other policies or practices.” No such language
21 about “policies or practices” appears in the 1969 Lease in this case.

22 ³ The 1960 lease included section 19 that said “[APS] agrees that in selecting
23 applicants for employment on the Reservation, it will employ Navajo Indians when
24 available in all positions for which they are qualified in the judgment of the Company,
25 and will pay prevailing wages to such Navajo employees.” *Aspaas*, 77 F.3d at 1130.

26 The 1966 amendment reiterated this “Navajo preference” provision. *Id.*

27 The 1985 amendment included section 25, which said “Lessee shall provide
28 preference in employment to Indians living within or near the Reservation in connection
with the construction and operation of the facilities contemplated in this Supplemental
Lease.” *Id.* at 1130 n.2.

1 These differences, however, are not dispositive in the Court's view. On the
2 spectrum of how clear contractual language waives the Navajo Nation's sovereign right
3 to regulate employment at a non-Indian employer, the lease in *Aspaas* undoubtedly
4 makes the tribe's waiver clearer than the 1969 Lease does. However, the test for whether
5 the tribe waived its sovereign power in this case is not whether the 1969 Lease meets the
6 standard set by *Aspaas*, the test is whether the 1969 Lease on its own unmistakably
7 waives the tribe's authority. As explained above, the Court finds, standing alone the
8 1969 Lease unmistakably does include such waiver.

9 Defendants have not offered evidence or a convincing argument that changes the
10 unambiguous meaning of the word "operation" as it is used in section 16. Without
11 something more, the Court declines to give new meaning to what is on its face clear. The
12 Supreme Court requires that the language waiving a sovereign right be unmistakable. *See*
13 *Merrion*, 455 U.S. at 148. The Court acknowledges that the language of the non-
14 regulation clause does not include the words employment, practices, or policies.
15 However, the non-regulation clause does include the Navajo Nation unmistakably
16 waiving their right to regulate the "operation" of NGS. The term "operation" is
17 necessarily broad because, by its common definition, it includes how NGS is run. If
18 employment policies are not included within this term, and were not unmistakably
19 waived, the Court would be challenged to identify what sovereign right the tribe did
20 unmistakably waive with the term "operation." The non-regulation clause would be
21 effectively meaningless. Accordingly, with no language explaining otherwise, operating
22 a power plant unmistakably contemplates and includes the people required to do the
23 operating.

24 Therefore, Defendants generally have the sovereign power to regulate the
25 employment activities of nonmembers engaged in consensual relationships with the tribe.
26 In this case, however, Defendants expressly waived their sovereign power to regulate the
27 employment policies of SRP by waiving their right to regulate the operation of NGS.

28 **C. PERMANENT INJUNCTIVE RELIEF**

1 Plaintiffs have also requested that the Court grant the permanent injunction
2 requested in their Complaint. (Doc. 162 at 17). In order to be granted a permanent
3 injunction the Supreme Court has said a plaintiff must satisfy four factors. A plaintiff
4 must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies
5 available at law, such as monetary damages, are inadequate to compensate for that injury;
6 (3) that, considering the balance of hardships between the plaintiff and defendant, a
7 remedy in equity is warranted; and (4) that the public interest would not be disserved by a
8 permanent injunction. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)
9 (ebay).

10 Given the Court's finding that the Navajo Nation waived its right to enforce the
11 NPEA at NGS, the Court also finds Plaintiffs are entitled to permanent injunctive relief
12 for the following reasons.

13 Plaintiffs have shown that they suffer irreparable harm by being subjected to the
14 NPEA. Plaintiffs have agreed to give preference in employment to Navajos by the terms
15 of section 18. Further, as discussed above in footnote 2, Plaintiffs developed and agreed
16 to the Plan in 1986, establishing further clarity for what Plaintiffs' obligations are in
17 terms of Navajo preference in employment. Enforcement of the NPEA goes beyond the
18 bargained for agreement between the parties and subjects Plaintiffs to irreparable harm in
19 the absence of injunctive relief.

20 Defendants claim Plaintiffs suffer no harm because "[e]nforcement of NPEA at
21 NGS would not change the status quo, except maybe to force SRP to live by the
22 commitments it has already made." (Doc. 165 at 20). If this were true, there would be no
23 need for this suit. Defendants are limited now to enforcing the bargained for agreement
24 between the parties, i.e. the Plan. If the NPEA is no different than the Plan, Defendants
25 would have no reason to pursue four years of litigation to enforce the NPEA instead of
26 just enforcing the Plan.

27 Due to the circumstances and the ongoing attempts to enforce the NPEA by the
28 Navajo Nation, Plaintiffs have shown that equitable relief is justified.

1 The balance of hardships also tips in favor of Plaintiffs because of the nature of
2 operating a power generating station like NGS. Plaintiffs need to be able to freely
3 determine who the most qualified candidates are and put the most qualified people in
4 critical positions. Further, Navajo employees are already protected by the Plan, state, and
5 federal employment law. Accordingly, the balance tips in favor of Plaintiffs.

6 Finally, the public interest is served by upholding the unambiguous terms of a
7 contract. The terms at issue here do not deny any rights to Navajo employees.
8 Consequently, the Court finds the public interest is served by granting a permanent
9 injunction.

10 Therefore, because Plaintiffs have satisfied the factors delineated in *ebay*,
11 Plaintiffs are entitled to permanent injunctive relief and the Court grants Plaintiffs'
12 request for a permanent injunction.

13 **V. CONCLUSION**

14 Based on the foregoing,

15 **IT IS ORDERED** denying Defendants' Motion to Dismiss Parties (Doc. 169).

16 **IT IS FURTHER ORDERED** granting Plaintiffs' Motion for Summary
17 Judgment (Doc. 162).

18 **IT IS FINALLY ORDERED** denying Defendants' Cross Motion for Summary
19 Judgment (Doc. 167).

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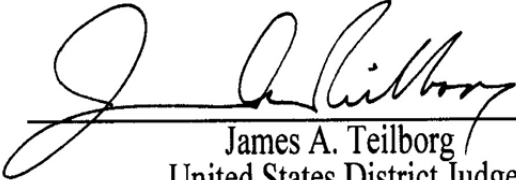
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1 The Clerk of the Court shall enter declaratory judgment for Plaintiffs Salt River
2 Project Agricultural Improvement and Power District, a municipal corporation and
3 political subdivision of the State of Arizona, and Headwaters Resources, Inc., a Utah
4 corporation, against Defendants Reynold R. Lee, Casey Watchman, Woody Lee, Peterson
5 Yazzie, Evelyn Meadows, Honorable Herb Yazzie, Honorable Louise G. Grant,
6 Honorable Eleanor Shirley, Leonard Thinn and Sarah Gonnig: the Court hereby declares
7 that Defendants (1) may not apply the NPEA to or enforce it against SRP, the other
8 Participants and/or their contractors (including Headwaters) at NGS; and (2) may not
9 regulate, through tribal proceeding or otherwise, except as provided by the 1969 Lease,
10 the operation of NGS by SRP, the other Participants and/or their contractors (including
11 Headwaters) related to employment matters. Permanent injunction to follow.

12 Dated this 28th day of January, 2013.

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James A. Teilborg
United States District Judge